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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO. 175

PETSONELLA MORAGNE, as personal representative of the Estate of EDWARD MORAGNE, SR., deceased, and PETSONELLA MORAGNE, individually,

Petitioner,

vs.

STATES MARINE LINES, INC., a corporation

Respondent,

vs.

GULF FLORIDA TERMINAL COMPANY, a corporation,

Respondent.

REPLY BRIEF OF PETITIONER

On Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

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Richard H. McInnis, On Brief

SUMMARY OF ARGUMENT

The opinions below, jurisdictional statement, questions presented, statutes and constitutional provisions involved and statement of the case are all as set forth in petitioner's original brief.

Since the respondents have not replied to the questions presented in petitioner's brief, we feel it necessary to set forth here the questions raised in respondents' briefs to enable an orderly reply to these arguments.

As petitioner sees the arguments of the respondents, they are:

1. Petitioner failed to argue in the court below the matters now presented to the Supreme Court.
2. Petitioner seeks to fashion a body of federal common law.
3. There is no need for uniformity in cases involving maritime death torts.
4. Petitioner has the same rights as all other Florida citizens and as is accorded the heirs of dead seamen under the Jones Act.
5. The pendency in the United States Senate of a bill to amend the Death on the High Seas Act should cause this Court not to grant relief to Mrs. Moragne.
6. The construction given the Florida Wrongful Death Act does not conflict with essential features of the maritime law.
7. Actions involving the wrongful death of longshoremen in navigable waters of the United States are maritime but local and, therefore, do not require uniformity of maritime law.

Since the above questions raised by the respondents are not responsive to the questions presented by the petitioner, petitioner is impelled to answer these questions as presented by the respondents in their briefs.

Petitioner points out to the Court, however, that the respondents have not responded to the issues raised by petitioner or by the Solicitor General, as amicus curiae, on the merits.

ARGUMENT

I.

CORRECTION OF ERRONEOUS STATEMENTS

Respondents in their briefs made the following erroneous statements to which petitioner points out the references in the record which disclose the error of these statements.

In the brief of respondent, States Marine Lines, Inc.:

(a) On page 9, respondent said:

> "The Petitioner presented the question to the Fifth Circuit as simply a question of interpretation of a Florida Statute."

Erroneous. See R. 19, 21, 45-56.

(b) On page 9, respondent said:

> "* * * the portion of the Fifth Circuit decision complained of here was invited and requested by Petitioner in its presentation of the appeal to the Fifth Circuit."

Erroneous. See R. 19, 21, 45-56.

(c) On page 15, second paragraph, respondent said:

> "* * * Petitioner has, under the Florida Wrongful Death Act, a cause of action for negligence identical with the one given a seaman's personal representative by the Jones Act."

Erroneous. In Florida under the common law a plaintiff does not have a cause of action for negligence *in whole or in part*, contributory negligence is a complete bar to recovery, and assumption of the risk and negligence of a fellow servant are defenses to the plaintiff's claim.

In the brief of respondent, Gulf Florida Terminal Company:

(d) On page 3, respondent said:

> "* * * Petitioner affirmatively sought construction of the Florida wrongful death statute by the Supreme Court of Florida."

Erroneous. See R. 19, 21, 45-56.

(e) On page 10, respondent said:

> "Petitioner's brief gives the impression that the doctrine of uniformity is all pervading and will not contenance application of any substantive or statutory law other than that declared by Congress or the Federal Courts."

Erroneous. See Petitioner's Brief pages 23-24.

II.

PETITIONER HAS NOT MISLED THE LOWER COURTS

Both respondents argue that petitioner failed to raise the questions now presented to this Court in the lower courts and

they cite the general rule that a party cannot be permitted to take advantage of errors which he has, even in good faith, invited or induced the lower courts to make. *Safeway Stores v. Oklahoma Retail Groc. Asso.*, 360 U.S. 334, 79 S. Ct. 1196, 3 L. Ed 2d 1280 (1959); *Autrey v. Williams and Dunlap*, 343 F. 2d 730 (5th Cir. 1965); *Holm v. American Ship Building Company*, 276 F. 2d 201 (6th Cir. 1960), cert. den. 364 U.S. 819, 81 S. Ct. 53, 5 L. Ed. 2d 50 (1960); *Corbin v. Baltimore & O.R.R.*, 234 F. 2d 78 (6th Cir. 1956); *Williamson v. Weyerhaeuser Timber Co.*, 221 F. 2d 5 (9th Cir. 1955).

The decisions cited by respondents are not in point. The District Court felt and stated, R. 13-14, that it was in doubt as to its ruling dismissing plaintiff's claim for breach of the warranty of seaworthiness and invited an interlocutory appeal to the Court of Appeals for the Fifth Circuit. All of the questions presented to this Court, except the question whether *The Harrisburg* should be overruled, were fully briefed and argued in the Court of Appeals for the Fifth Circuit. R. 45-57. The question of overruling *The Harrisburg* is briefed and argued at the request of the Supreme Court and is not deemed by petitioner to be essential to a reversal of the Court of Appeals in this case. See petitioner's brief page 25. Although petitioner objected to certification by the Court of Appeals of the question involved to the Supreme Court, R. 19-21, petitioner did not consider it to be necessary or appropriate to raise the constitutional questions involved herein in the Florida Supreme Court.

III.

PETITIONER DOES NOT SEEK TO FASHION A BODY OF COMMON LAW

The respondent, States Marine Lines, Inc., throughout its brief, repeatedly states that it is Mrs. Moragne's conten-

tion that this Court should establish a body of uniform federal common law. Nowhere does Mrs. Moragne in her brief make any such contention. Mrs. Moragne asks the Court to apply *established* maritime law uniformly.

The shipowner, States Marine Lines, Inc., using a device commonly used in jury trials where no logical argument can be made in opposition to the merits of the case, sets up a "straw man" (here, federal common law) and then methodically strikes down the "straw man."

This case emphatically does not involve the common law, let alone "federal common law" which was laid to rest in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U.S. 518, 48 S. Ct. 404, 72 L. Ed. 681 (1925); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 43 S. Ct. 9, 67 L. Ed. 107 (1922); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 30 S. Ct. 140, 54 L. Ed. 228 (1910), have nothing to do with the instant case. Nor does the fact that this case is in the federal court by reason of diversity jurisdiction detract from the principle of law which is here in controversy. Whether this case were on the admiralty side of the federal court or in the state court or in the federal court by diversity jurisdiction cannot affect the question whether the State of Florida can fashion the duties and obligations applicable to a maritime tort which results in death when such duties and obligations so fashioned conflict with established maritime law.

The shipowner misleads this Court when it advises the Court on page 11 of its brief:

> "* * * that over 4,000 square miles of the surface of Florida, or roughly 8%, is covered by internal water."

Mrs. Moragne has never made the contention that maritime

law should apply to waters of the State of Florida which do not constitute navigable waters of the United States.

IV.

RESPONDENTS HAVE MISCONSTRUED PETITIONER'S ARGUMENT ON UNIFORMITY

Both respondents construe petitioner's argument to require absolute uniformity in all matters maritime. Petitioner respectfully points out that she has never taken this position. Petitioner's entire argument is premised upon the oft-repeated constitutional understanding that the states may "supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation." *Just v. Chambers*, (1941) 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903; *The City of Norwalk*, D. C., 55 Fed. 98. It is the position of Mrs. Moragne that Florida may not abolish the well-established duty of a shipowner to furnish a seaworthy ship to a longshoreman employed thereon in cases involving wrongful death; that this duty is thoroughly ingrained in maritime law and whether the seaman is injured or killed, the duty exists, the breach of which must furnish liability for death occurring on navigable waters of the United States; that the Florida Supreme Court may not ennunciate legal principles which conflict with or are "hostile to" the "characteristic features of the maritime law" which is so well established.

On pages 14-19 of the shipowner's brief, the shipowner, States Marine Lines, Inc., points to a number of cases which the shipowner contends involve situations in which uniformity is not required. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969), is not in point because of the clear legislative history as pointed out in that case. *Puleo v. H. E. Moss & Co.*, 159 F. 2d 842 (CA 2,

1947); *Fonseca v. Prann*, 282 F. 2d 153 (1st Cir. 1960); *Standard Dredging Corp. v. Murphy*, 319 U.S. 306, 63 S. Ct. 1067, 87 L. Ed. 1416 (1943); *Southern Pacific Co. v. Commonwealth of Kentucky*, 222 U.S. 63, 32 S. Ct. 13, 56 L. Ed. 96 (1911); *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56 (1961); *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955); *Loveless v. Employer's Liab. Assurance Corp.*, 218 F. 2d 714 (CA 5, 1955); *Cooley v. Port Wardens*, 53 U.S. 299, 320, 13 L. Ed. 996, 1005 (1851); *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. 245, 252, 7 L. Ed. 412, 414; and *Mobile County v. Kimball*, 102 U.S. 691, 697, 26 L. Ed. 238, are not in point because none of these cases involved any state law which conflicted with existing federal maritime law. *Allen v. United States*, 338 F. 2d 160 (9th Cir. 1964) was grounded upon *The Harrisburg* and involved a statute of limitations problem. *Gillespie v. U. S. Steel Corporation*, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2nd 199 (1964) was grounded upon the pre-emption doctrine. Therefore, none of these cases cited by the respondent are in point on the proposition involved in this case, i.e. whether a state can declare state law applicable upon navigable waters of the United States which conflicts with established federal maritime law.

V.

PETITIONER DOES NOT HAVE A CAUSE OF ACTION FOR NEGLIGENCE IDENTICAL WITH ONE GIVEN A SEAMAN'S PERSONAL REPRESENTATIVE UNDER THE JONES ACT

The respondent shipowner, brief page 15, makes the flat statement that the petitioner has a cause of action for negligence under the Florida Wrongful Death Act identical with one given a seaman's personal representative under the Jones Act. Nothing could be further from the truth. Under

the Jones Act, negligence "in whole or in part," "negligence in the slightest degree" will support a verdict for the personal representative of a dead seaman. *Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500, 77 S. Ct. 443, 449, 1 L. Ed. 2d 493.

The requirement of casual relationship is relaxed under the Jones Act. *Kernan v. American Dredging Co.*, (1958) 355 U.S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 382. Contributory negligence is not a complete bar to recovery under the Jones Act. On the other hand, in Florida negligence must be proved by a preponderence of the evidence to be casually related to the death of plaintiff's decedent and contributory negligence in the slightest degree will bar recovery. There is, in fact, only the vaguest similarity between the seaman's right of action under the Jones Act in Florida and a plaintiff's action for negligence in Florida.

VI.

THE PENDENCY IN THE UNITED STATES SENATE OF A BILL TO AMEND THE DEATH ON THE HIGH SEAS ACT SHOULD NOT DEPRIVE MRS. MORAGNE OF RELIEF IN THIS CASE

Both respondents point to the pendency in the United States Senate of a bill introduced by Senator Warren Magnuson of Washington (S-3143 filed November 14, 1969) to amend the Death on the High Seas Act to become a general maritime death act. Both respondents suggest to this Court that the Court should not overrule *The Harrisburg or The Tungus* because of the pendency of this bill. Petitioner is advised by Senator Magnuson's office and the staff of the United States Senate Committee on Commerce that no hearings have been set on this bill, that it is not known whether hearings will be set during this session of Congress, and that action on the bill

will likely be a long time in coming. It is interesting to note that neither respondent suggests that it, or the industry of which it is a member, is supporting this bill or will support any similar legislation. In any event, ultimate passage of the bill cannot help Mrs. Moragne and her children.

On the other hand, petitioner suggests that this Court should certainly recede from the reasoning of the majority in *Tungus* which has resulted in the unfortunate holding in *Moragne* and that this Court might and should overrule *The Harrisburg* and call the attention of Congress to the need for a general uniform maritime death act.

VII.

THE CONSTRUCTION GIVEN THE FLORIDA WRONGFUL DEATH ACT BY THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ADOPTING THE INTERPRETATION OF THE FLORIDA SUPREME COURT CONFLICTS WITH THE ESSENTIAL FEATURES OF MARITIME LAW

Clearly, under maritime law applicable to torts occurring upon vessels on navigable waters of the United States, the owner of a ship owes to longshoremen a warranty of seaworthiness of the vessel upon which they are employed. This duty is rooted in maritime law and applied uniformly to those persons entitled to the warranty who are injured. Now respondents contend, and the Florida Supreme Court has held, that this duty to supply a seaworthy vessel is extinguished when the injury which results from a breach of this duty ends in the death of that person. Thus, Florida has established a rule of law which is 180 degrees contrary, and precisely opposite to the maritime duty to furnish a seaworthy vessel upon navigable waters of the United States and, therefore, violates the essential characteristics of maritime law.

VIII.

THE MARITIME BUT LOCAL DOCTRINE DOES NOT APPLY IN THIS CASE

The maritime but local doctrine has sometimes been misused and respondents would have this Court re-enunciate this doctrine in a situation where it is not applicable. The essence of the maritime but local doctrine supposes first that neither Congress or the federal courts have occupied a field of maritime law, and second that the states may act in this field in a way which is not contrary to nor in conflict with maritime law.

To show the error of respondents' position, let us assume that Florida law may fully occupy the field of recovery for wrongful death in the absence of a federal wrongful death statute. What then becomes of federal laws relating to limitation of liability? If the Florida law on wrongful death is pervasive and superior, then surely the respondents should not be entitled to the federal maritime rule which entitles them to limit their liability to the value of the vessel and pending freight. Of course, such is not the law and the maritime doctrine of limitation of liability is applicable to a disaster involving maritime death upon navigable waters of the United States within the territorial limits of Florida. *Just v. Chambers*, (1941) 312 U.S. 383, 61 S. Ct. 687, 85 L. Ed. 903.

For another example, assume that the death of a longshoreman upon navigable waters of the United States within the territorial limits of Florida is caused by an unseaworthy stowage of cargo performed by a stevedore in the port of New York. May the longshoreman's beneficiaries bring this action in New York against the stevedore who was not the employer of the longshoreman and the vessel whose unseaworthiness ultimately resulted in his death in the State of Florida? If so, does not the doctrine of unseaworthiness apply in New York?

If the suit were brought in Florida, does it apply under Florida law? Can it be said then that the issues in such a case are maritime but clearly local? The issue in this case to be decided by the Supreme Court is not local but is inextricably interwoven with the maritime commerce between the states and with foreign nations.

IX.

TO OVERRULE THE HARRISBURG WOULD NOT CREATE A LEGAL JUNGLE

The shipowner suggests, brief 19-21, that if the Court overrules *The Harrisburg* a legal jungle would be created and suggests numerous questions which it contends would trouble the courts for years. Petitioner does not see such a troublesome problem.

For example, taking the questions as set forth by the shipowner, petitioner seeks to answer these questions very simply.

(a) Identification of Beneficiaries:

1. In whom does the action vest?

A. In the personal representative as provided under the Jones Act and the Death on the High Seas Act.

2. Are children to share with widow?

A. Yes, as provided by applicable existing law.

3. Are adoptive children to share?

A. Yes, as provided by existing law.

4. Are stepchildren to share?

A. Yes, if dependent upon the decedent.

5. Are collateral relatives to share?

A. Yes, if dependent upon the decedent.

6. Do personal representatives share?

A. Yes, for loss to the estate as under existing law.

7. What happens upon disqualification of preferred beneficiaries?

A. Handled as under the Jones Act and Death on the High Seas Act.

8. What happens upon death of a beneficiary?

A. Handled as under the Jones Act and Death on the High Seas Act.

(b) Harmony with Survival Act Procedure:

1. Does result of Survival Act Suit affect wrongful death claim?

A. No. The two are mutually exclusive as to damages.

2. Must the suits be joined?

A. No. This presents no problem under existing law.

3. Damages recoverable under respective suits must be mutually exclusive.

A. Yes.

(c) Damages Recoverable:

1. Should there be a monetary limit?

A. Why should there be? There are none under the Jones Act or under the Death on the High Seas Act.

2. Who recovers decedent's pain and suffering?

A. The personal representative.

3. Are grief and mental anguish recoverable; by whom?

A. Yes. By the spouse and minor children who have suffered same.

4. What about loss of advice and companionship?

A. Recoverable as under the Jones Act for loss of nurture.

5. What if beneficiary negligently contributed to death?

A. How could they in a maritime death?

6. What consideration is given receipt of pension benefits, insurance proceeds, or share of estate by beneficiary?

A. The same as is presently given under the general law of damages applicable in the state and federal courts.

7. Which parent, if either, controls claim for death of a child; what elements of damages are recoverable in such action?

A. As under existing law the parent who has custody of the child and the elements of damages generally recoverable for such death.

(d) Conduct Imposing Liability:

1. Should liability be based on fault concepts only?

2. Should fault-blind compensation come from funds publicly administered or from private litigation?

A. No problem is imposed under existing law on these questions and petitioner suggests that the shipowner raises the questions in an excess of exuberance.

The shipowner further suggests that this Court might become involved in construing local laws of testate and intestate succession, local tax structure, local civil actions paralleling the death act, and local statutes and systems providing the receipt of collateral funds because of the death. Petitioner is not familiar with the laws of other states but can state categorically that no such problems exist in the State of Florida and that petitioner has never had any such problem arise in causes of action for death arising either under the Jones Act or the Death on the High Seas Act. Petitioner does not see a specter of problems arising from overruling *The Harrisburg* such as is suggested by the shipowner. The shipowner suggests, brief page 22, that it is no undue burden on petitioner to be bound as is every other Floridian by the laws of Florida and that petitioner should not be entitled, for example, to the same rights she might obtain in the State of Virginia. It is, of course, obvious that the same argument could be applied to seamen, to ships or any other maritime entity.

The fact is that the Constitution of the United States extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction and the Supreme Court has consistently held that while the states may supplement maritime law they may not fashion a law which is different, hostile or inconsistent with substantive maritime principles. This is precisely what the Florida Supreme Court has done in the instant case and the Court of Appeals for the Fifth Circuit felt bound by the opinion of the Florida Supreme Court pursuant to the majority rule established by this Court in *M/V Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524.

CONCLUSION

The respondents have failed to address themselves to the primary issue in this case. They have raised false or irrelevant

collateral issues not material to the basic issue raised by the petitioner. The questions presented to the Court in this case are whether Florida may establish substantive maritime law applicable to maritime torts occurring upon navigable waters of the United States resulting in death which conflict with substantive federal maritime law; and whether the rule of *The Harrisburg* adopting a common law rule which has been universally abrogated and is celebrated in its denunciation, should now be overruled. Petitioner urges the Court to recede from the majority reasoning in *M/V Tungus v. Skovgaard* and to overrule *The Harrisburg*. Petitioner concludes that the Supreme Court should reverse the decision and judgment of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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I HEREBY CERTIFY that three true copies of the foregoing Reply Brief of Appellant have been furnished by U. S. Mail, postage prepaid to:

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